U. S. Supreme Court.

SUPREME COURT OF THE UNITED STATES—
DECEMBER TERM, 1866.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* PETER M. BRYSON,
Plaintiffs in Error,

vs.

THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK,
Defendants in Error.

Brief and Points for the Defendants in Error.

STATEMENT.

This case arose upon a *certiorari* prosecuted by the relator out of the Supreme Court of the State of New York and directed to the defendants in error. The relator was a holder of certain shares in the National Phœnix Bank of the city of New York, a banking association organized in that city under the National Bank Law. These shares had been assessed in the year 1866 for the purposes of taxation under the State laws

by the defendants in error, as personal property of the relator, in the ward in which said bank is located.

In justification of their proceedings the defendants in error relied upon the following statutes:

First.— The enactments, in the form of provisoes, contained in the forty-first section of an act of Congress commonly called the National Bank Law, entitled "An act to provide a national currency, secured by a pledge of United States Bonds, and to provide for the circulation and redemption thereof," passed June 3, 1864. (13*th Statutes at Large*, *p.* 99).

Said enactments are in these words:

"*Provided*, That nothing in this act shall be construed to prevent "all the shares in any of the said associations held by any person "or body corporate from being included in the valuation of the per- "sonal property of such person or corporation in the assessment of "taxes imposed by or under State authority at the place where "such bank is located and not elsewhere, but not at a greater "rate than is assessed upon other moneyed capital in the hands of "individual citizens of such State.

"*Provided further*, That the tax so imposed under the laws of any "State upon the shares of any of the associations authorized by this "act shall not exceed the rate imposed upon the shares in any of "the banks organized under authority of the State where such asso- "ciation is located.

"*Provided, also*, That nothing in this act shall exempt the real "estate of associations from either State, county, or municipal "taxes to the same extent, according to its value, as other real es- "tate is taxed."

Secondly.—An act of the Legislature of the State of New York passed April 23, 1866, entitled "An Act authorizing the taxation of stockholders in banks and the surplus funds of savings banks."—*Laws of N. Y. for* 1866, vol. 2, p. 1,647.

The first section of said New York State act is in the following words:

"SECTION 1. No tax shall hereafter be assessed upon the capital of "any bank or banking association organized under the authority of "this State or of the United States, but the stockholders in such "banks and banking associations shall be assessed and taxed on the "value of their shares of stock therein; said shares shall be included "in the valuation of the personal property of such stockholder in the "assessment of taxes at the place, town, or ward where such bank or "banking association is located, and not elsewhere, whether the said "stockholder reside in said place, town, or ward, or not; but not at "a greater rate than is assessed upon other moneyed capital in the "hands of individuals in this State. And in making such assessment "there shall also be deducted from the value of such shares such "sum as is in the same proportion to such value as is the assessed "value of the real estate of the bank or banking association, and in "which any portion of their capital is invested in which said shares "are held to the whole amount of the capital stock of said bank or "banking association. And provided, further, that nothing herein "contained shall be held or construed to exempt from taxation the "real estate held or owned by any such bank or banking association, "but the same shall be subject to State, county, municipal, and other "taxation to the same extent and rate and in the same manner as "other real estate is taxed."

Thirdly.—An act of the Legislature of the State of New York passed April 20, 1866, entitled

"An act to extend the time for making assessments for taxes in the city and county of New York, and for other purposes."—*Laws of New York for* 1866, *vol.* 2, *pp.* 1,493.

Said State act is in the following words:

"SECTION 1. The Commissioners of Taxes and Assessments for the "city and county of New York are hereby vested with full power "and authority to make therein the assessments authorized by any "law of this State, and for such purpose the time for completing the "assessment rolls for the current year shall be extended to the thir-"tieth of June, eighteen hundred and sixty-six."

The case was heard at a General Term of the Supreme Court of New York on the return of the defendants in error, as upon a demurrer thereto.

The return was made on June 29, 1866. It contained the following statement:

That, after May 2 and before June 1, 1866, the defendants in error did assess the relator upon the value of said shares, and included the same in the valuation of his personal estate.

That they made no allowance or deduction on account of investments by the bank in any securities of the United States.

That such a deduction or allowance was made in assessments upon insurance companies and individuals.

That the assessment rolls required by law to be delivered to the Supervisors were not yet completed at the return-day of the certiorari, but were being so completed; and that, when delivered, the value of the relator's shares would be included in the valuation of his personal property in the ward in which the bank is located.

That, after making said assessment, the defendants in error notified the relator thereof, and that the same might be corrected and revised at any time before June 30, 1866.

That the relator presented his objections accordingly, which were disallowed.

The General Term gave judgment for the defendants below, now the defendants in error.

Whereupon the relator appealed to the Court of Appeals of the State of New York.

On such appeal to the Court of Appeals—the highest court of law in the State of New York—the judgment of the Supreme Court of that State was affirmed; and the relator prosecuted a writ of error from this court on that judgment, pursuant to the 25th section of the judiciary act, on the alleged ground that the decision thereby made is against a lawful exemption claimed by him under the Constitution of the United States and the statutes thereof.

1st Statutes at Large, p. 85.

POINTS.

First Point.—The discussion of any question that may be thought to be open for judgment in this case will be greatly facilitated by the exclusion of matters which are not in dispute or are not relevant. For this purpose it is premised, as a distinct point, that none of the recent decisions of this Court adverse to the taxation of banks in the State of New York can have any effect upon the judgment in this case.

I. It is conceded on all hands that the public securities of the United States cannot, singly and by themselves, be taxed by State authority; nor can a State tax them by imposing a tax on the whole mass of the owner's

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property and shutting its eyes to the fact that such public securities form a part of the mass so taxed.

II. The first of these cases was *The People ex rel. the Bank of Commerce vs. The Commissioners of Taxes for the city and county of New York*, 2 *Black*, 620, *reversing s. c. in* 23*d N. Y. Reports*, *p.* 192. It arose upon the State act of 1857 requiring that the capital stock of the banks of the State should be assessed "at its actual value, and taxed in the same manner as other personal and real estate." (See statement by MR. JUSTICE NELSON, 2 *Black*, *p.* 628, and by the Reporter in 2 *Wallace*, *p.* 200.) Here was a tax on the bank itself, based on the actual value of *its* property. Part of that property consisted of the public securities of the United States held by the bank as an investment of its capital. The State had, therefore, assumed to tax the public securities of the United States in the hands of the public creditor, and this was held to be illegal. This decision was in 1862.

III. The next was *The Bank of the Commonwealth's case*, reported as the *Bank Tax Case*, 2 *Wallace*, 200.

This arose on a State tax act passed in 1863 imposing a tax directly on the banks themselves "on a valuation equal to the amount of their capital paid in or secured to be paid in." This Court, in the opinion delivered by MR. JUSTICE NELSON, held this to be "simply a change in the mode of ascertaining or fixing the amount of the capital of the bank which is made the *basis of taxation.*"

In that case the bank's capital was mainly invested in the public debt of the United States; and the State law imposing a tax on the bank itself, based upon the assumed amount of that capital, was held to be a tax on the public securities of the United States in the hands of the public creditor.

Both of these cases went upon what, since the masterly expositions which have been made in this Court, seems an obvious and indisputable truth. In each case the tax was imposed upon the creditor of the United States and was based, in whole or in part, on the securities held for the reimbursement of a loan to the general government.

SECOND POINT.—The reversal by this Court in *Van Allen* vs. *The Assessors*, 3 *Wallace*, 573, is equally without bearing upon the present case.

I. After the before-mentioned cases arose, and on June 3, 1864, Congress passed the present National Bank Law. (*13th Statutes at Large, p.* 112.)

After the passage of this National Bank Law and on March 9, 1865, came an act of the Legislature of the State of New York entitled "An act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States." (*Laws of New York for* 1865, *p.* 169.)

With a view to enable the State to avail itself of the privilege of taxing the shareholders in the national banks in conformity with the National Bank Law of 1864, the tenth section of the said State act of March 9, 1865, provided as follows:

SECTION 10. All the shares in any of the said banking associations organized under this act, or the act of Congress mentioned in section 1 of this act, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof resides in such town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State; provided that the tax so imposed upon such shares shall not exceed the par value thereof; and provided, further, that the real estate of such associations shall be subject to State, county, or municipal taxes to the same extent, according to the value, as other real estate is taxed.

This State act of 1865 did not alter the pre-existing system of taxation under the State laws by which each State bank was taxed directly upon the amount of its capital, actual or assumed. In applying that system it was necessary, according to the decisions of this Court, to deduct the amount of any securities for the United States loans held by a bank as an investment of its capital. Without an alteration of the existing State law in this respect there was conferred upon the shareholders in the State banks—indirectly indeed, but still very manifestly—an advantage over shareholders in the national banks. This was not intended; and the second proviso in the 41st section of the National Bank Law of 1864 carefully guards against such a result. That proviso is that the tax so imposed under the laws of any State

"shall not exceed the rate imposed upon *the shares* in any of the banks organized under authority of the State where such association is located."

State taxation in respect to the State banks was required to be upon *the shares* therein. This was an indispensable prerequisite to the exercise of any power by a State to tax *shares* in the national banks.

The tenth section of the State Enabling Act of 1865, as has been shown, violated this rule.

In Van Allen vs. the Assessors, 3d

Wallace's U. S. R., 573, the judgment of the State court was reversed for this error or oversight in State legislation. Had the case been like the present the judgment of the State court would have been affirmed.

See the case in the State court, *City of Utica vs. Churchhill*, 33 *New York R.*, 162.

After the decision of this Court in *Van Allen vs. The Assessors*, 3d *Wallace*, 573, and on April 23, 1866, the Legislature of New York passed the act entitled "An act authorizing the taxation of stockholders of banks and the surplus funds of Savings Banks." *Laws of New York for* 1866, *vol.* ii, *p.* 1,647.

Its first section is above recited. It was designed, among other things, to obviate the oversight which had occurred in the State enabling act of 1865, (section 10), and, by taxing in like manner the *shares* in both the state banks and the national banks, to bring into operation within the State of New York the taxation of shares in the national banks sanctioned by the present National Bank Law.

The assessments now in question were made in intended conformity with the forty-first section of the said National Bank Law and the State act of 1866. They are believed to be free from just exception.

THIRD POINT.—To avoid, if possible, irrelevant topics, and bring the discussion within reasonable limits, certain propositions will be conceded. They have been so firmly settled on authority that, at this time and in this place, they should not be disputed by any one.

I. A State cannot impose a tax upon the public securities of the United States issued under the loan acts.

II. Under its own authority, a State cannot, in any manner, directly or indirectly, impose a tax upon any organ or agency of the United States.

III. The national banks existing under the act of Congress passed June 3, 1864 (13 *Statutes at Large*, *p.* 99, *sections* 62-64), are such exempted agencies. Therefore, *they* cannot be taxed.

FOURTH POINT.—The claim of the shareholders in the national banks to exemption from or a reduction of the tax assessed upon their shares cannot be placed upon the ground that these banks are organs

or agencies of the government. It is undeniable that if, upon principle, that circumstance would otherwise have afforded to the shareholder such a general immunity from all taxation by State authority, the forty-first section of the National Bank Law passed June 3, 1864, has effectually taken it away. Consequently, the only open inquiry is, whether the exemption from State taxes incident to the subject on constitutional grounds, and, by the loan acts, formally guarantied to the holders of United States securities, entitles a shareholder in a national bank to have the taxable value of his shares in such bank obliterated or reduced by the fact that all or a portion of the bank's capital is invested in public securities. This indisputable fact is stated to the same end as all that has preceded it in these points, *i. e.* that the debate may be confined to the real issue.

FIFTH POINT.—Thus laying out of view, as the act of Congress requires or, at least, allows, the peculiar ground of exemption that the national banks are governmental agencies, the national banks and the State banks will stand, in point of principle, on precisely the same footing, as respects their own or their shareholders' claims to any exemption from taxes under State authority growing out of the investment of their respective capitals in United States securities.

The question will be first considered in its

general form. The precise intent or true construction of the provisoes in the forty-first section of the National Bank Act of 1864 may then be more easily and intelligibly discussed.

SIXTH POINT.—There is nothing in the *form*, the *substance* or the *nature* of the immunity from State taxation guarantied to the public creditor lending his money to the government which presents any obstacle to the tax in question.

(I.) The most direct form in which Congress has expressed the immunity is as follows:

> "All stocks, bonds, and other securities of the United States held by individuals, corporations or associations within the United States shall be exempt from taxation by or under State authority." (*12th Statutes at Large, p.* 346, *section* 2.)

II. This immunity could not have been supposed by its framers to extend beyond a protection from taxes upon the sum loaned to the government and from taxation upon

the interest to accrue on such loan. The whole transaction between the government and the lender which this privilege is designed to invite consists in the investment or loan to the government and the due return thereof with interest. This, and this alone, forms the subject of the guaranty. A tax upon this transaction itself, or upon any of its parts or details, would, indeed, be a violation of the guaranty. A tax upon the document held as an evidence of it, or upon any act, proceeding, step or measure necessary to be taken by the lender in order to keep securely his investment or the evidence thereof, or to collect and receive his interest, would be a similar violation. But with an entire protection of the loan and all its incidents the aim, object and reason of the immunity end. And it is inconceivable that the lender could have expected anything more than this measure of protection. Incidental advantages which might be supposed to attend the possession of such securities at the time, formed no part of the guaranty. Changes in trade, opinion, habits or public policy might, of course, affect or wholly set aside these incidental advantages at any moment. The government did not guaranty the continuance or perpetuity of all existing markets or facilities for the sale or disposition of the securities.

III. The "stocks, bonds, and securities," by and of themselves, could never be useful or available to the holder to any purpose other than securing a return of the principal and payment of the interest. Consequently, a tax imposed on *them* by State authority must be void. And however they may be held, whether *alone* or in a mass with other property, and in whatever way they may be used, a tax, which is, in effect, a tax upon them, as property, falls directly within the terms of the exemption and is necessarily void. Hence the failure of every attempt by a State to impose a tax upon the capital or the property of a corporation without deducting so much of that capital or property as was invested in United States securities. These attempts manifestly and in their terms came within the very letter of the prohibition. Had the State methods of taxing their banks directly been a systematic arrangement for taxing, in each year, the surplus profits of each bank's entire business, it is conceived that no valid objection could ever have been taken to it, although no deduction had been made for interest received on United States securities held by the bank.

IV. The erection of a legal entity, as an incorporated bank, with liberty to trade upon the credit of United States securities held by it

and to pledge those securities for the redemption of its circulation, is an act not falling within the range of any benefit held out to the lender or properly anticipated by him; it is quite beyond and outside of the transaction to which the immunity in its substance or the expressed guaranty, in its form, applies.

V. A bank never has, in strictness, any title to or ownership of its own shares. The shares viewed as merely existing in contemplation of law or as a script duly prepared for issue are not property. They are utterly without value or significance until actually issued to and held by some person other than the bank itself. Until issued they no more constitute a property, or even an evidence of property, than a man's own promissory note previously to its issue. In respect to its shares, the bank has only a function or power. It has capacity to issue them and thereby to create in the hands of the purchaser that which is recognized in law and in the common understanding of men as his property.

The shares, after they are thus in real existence as the property of third persons, give to such third persons a right to profit, if any accrue, in the corporate business;

but they confer upon the holders no right, title, or interest in the property of the corporation. Though part of the capital be invested in United States bonds, no shareholder has any interest in these bonds. Neither has he any specific claim upon the interest paid upon them by the United States. That interest is received, held, owned and disbursed by the corporation. The stockholders' dividends do not consist of a proportionate part of each sum earned by the corporation; they consist of the surplus earnings of the bank's entire business after deducting all the expenses and losses incurred in the whole of that business.

A shareholder in a corporation does not hold or own its capital or any part thereof. The capital is owned by the corporate body; the shareholder has no right to it or claim upon it. Should the corporation perish he may or may not receive a dividend from it, according to the condition of its affairs at the dissolution. But such a mere possibility of something like an inheritance out of the capital at the end of an existence that may endure forever cannot be said to give its owner a present interest in that capital. Even in the case of a dissolution the shareholder does not become entitled to the property of the corporation specifically, or to any part of it. He is only entitled to a dividend of the

Nor partner in partnership but can partner be taxed on his share of income derived from bonds of a stock & firm?

surplus *proceeds* of its estate after payment of all its debts and liabilities. The real value of a share in a corporate body consists in its owner's right to annual profits; the greater the prospect of immortality in the corporation — the surer it is that neither its capital, nor any part of it, will ever come *into the hands* of the shareholder—the greater will always be the market value of the share. It is as a permanent annuity, regulated by the profits of an established business, that the share has its real worth and its estimated value.

VI. From these and other considerations that might be multiplied indefinitely, it seems quite apparent that a shareholder's interest and property in his share are things quite distinct from and independent of the capital or property owned by the bank itself. As such they are proper subjects of State taxation; and in taxing them the State does not, directly or indirectly, tax the public securities held by the bank.

VII. The entire transaction on which a right to tax bank shares arises is the creation of the incorporated bank, the aggregation

of its corporate capital, and the transaction of its annual business. The tax imposed in these cases is not a tax upon interest received by the public creditor, but a tax upon the profits of a business in which the public creditor has embarked that interest as capital.

VIII. Taxes are annual burdens. They are presumptively payable, not out of the principal or capital of the tax-payer's estate, but out of the annual profit arising to him from the employment of his capital. A shareholder, in like manner as other persons, is taxed by way of compelling him to appropriate annually a portion of his annual income from the banking business to the support of the government. The income of a shareholder in an incorporated bank is his share of the profits of the business of the bank for the current year. If the bank has made investments in government securities *non constat* that income from such investments form any part of the profits. The particular business in which the bank employed that part of its means may have left no profit.

It would be a strange office for a tax-assessor to institute inquiries for the purpose of ascertaining whether or not this was the fact.

SEVENTH POINT.—The language employed in the forty-first section of the National Bank Law explicitly permits "all the shares" in any of the national banks to be included in the valuation of the owner's personal property; and without some very controlling reason for it no exception or qualification can be implied. It is respectfully submitted that the weightier reasons are against any restriction of the privilege thus accorded to the States.

I. Should it be assumed that, in providing for this method of taxation by the States, Congress had no other design immediately in view than that of relieving the States from the possible difficulty of taxing shareholders therein presented by the privileged character of the national banks as fiscal agents of the government, a deduction from the value of the shares by reason of the banks' investments in United States securities could not be claimed as a necessary or in any degree presumable consequence of this assumption. It has already been shown that, on principle, no right to such a deduction can be maintained; and it it is clear that no decision ever made in this Court warrants it.

II. The nature of the guaranty against taxation

of United States securities by State authority, as shown and stated in the preceding Sixth Point, conclusively repels the idea that when they are employed as capital in an independent business altogether distinct from the loans of which they are evidence, the whole profits of that business may not be taxed.

When the act of 1864 was passed it was probable that the national banking system might, to a great extent, absorb the banking business of the country, and it was obviously proper that individual profits derived from it ought not to enjoy the protection and facilities afforded by the State laws without contributing to the cost thereof in common with other occupations.

As United States agencies, the national banks themselves could not be taxed by State authority unless by the express consent of Congress. It therefore became necessary to devise some method of taxing the profits of *the business*.

A practicable and convenient method of effecting the object was by taxing the shares in the hands of the shareholders. On principle, and by the very words of the National Bank Law, the shareholders were the receivers of the net annual profits. (*See National Bank Law, section* 33.)

The most illustrious name in the judicial

annals of our country had pointed out a method.

In *McCullough vs. The State of Maryland*, 4 *Wheaton*, 436, CHIEF JUSTICE MARSHALL said that the objection to taxing a national bank itself, as a public agent "does not extend to a tax imposed upon the interests which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State."

The idea here developed is not confined to the particular exemption then in controversy. It discriminates broadly between the bank itself, as a legal entity completely exempted from State authority, and its shareholders, as individuals deriving an income or benefit from its dealings and operations. The latter, in this relation to the bank, are treated as properly subject to a fair and equal system of State taxation.

It refers to citizens of Maryland because, without some aid from Congress, it might not be easy to collect the tax from non-residents, and, in this cautious view of the subject, a guide, in point of detail, was furnished, which Congress made available, when, in 1864, that body undertook to put the general principle into practical execution. The shares were directed to be assessed without any reference to the resi-

The commentaries [*Pandekten*] of *Professor Windscheid, of Munich, published in* 1863, are very clear on this subject. A translation is furnished:

"In the case of a corporation the subject of the rights and duties is the legal personality as such, and not, for instance, in the case of an eleemosynary foundation, the individuals who are the sole recipients of the benefits of the property, or, in the case of an ordinary corporation, the individual members. On the contrary, it is perfectly consistent with the idea of legal personality that the members of a corporation should have interests in the corporate property collateral to the ownership, *e. g.*, easements or other rights of enjoyment in things owned by the corporation; this is just as admissible as it is that one man should have rights in the property of another man. So, too, it does not affect the legal personality that the property of the corporation should exist merely to be enjoyed by its members in proportion to their interests in it, as, *e. g.*, in the case of the German [or New England] proprietaries of common lands; nor even that the property of the corporation is distributed (as far as its value is concerned) among the individual members, as in modern stock companies. These are corporations peculiarly constituted; but the corporation, the legal personality, is a corporation still. The owner of the property is not the single individual; the owner is an entity outside of the members—to wit, the collective unity—unless the equivalent expression is preferred that the property has no owner. This is even true where the corporate property is wholly absorbed by the rights of enjoyment accruing to the members. It will be impossible in any case, for instance, to represent the right of property by merely adding together the several advantages which it secures, for the simple reason that the corporate property is something else than the sum

rights of enjoyment accruing to the members. It will be impossible in any case, for instance, to represent the right of property by merely adding together the several advantages which it secures, for the simple reason that the corporate property is something else than the sum total, the aggregate, of these advantages. Where the property is divided according to its value among several persons, a distinction must be drawn. *If, as in stock companies, the share of each member is expressed in money, it is self-evident that the members hold no part of the property, for this property (i. e., the rights and duties of which it consists) is not money, but something else.* The members are merely entitled to the performance of certain acts on the part of the real owner of the property (the stock company). And this is none the less true of the produce of the property than of the property itself. As a matter of political economy the income of the company is owned by the stockholders; as a matter of law it is not. If, on the other hand, the shares of the members are expressed in fractions of the property, it is a case of real coproprietorship. Still, even in this case, it must be considered whether, after all, the proper object of each share is not really the money value of the property rather than the property itself, which may perhaps be the fact, *e. g.*, in mining associations."

Windscheid, Pandekten, page 129, *sec.* 74 *and note* 5. This writer sustains his positions by apposite citations from the Digest.

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dence of the owner "at the place where such bank is located."

The coincidence of views on the part of the Chief Justice, in his great dictum, and of Congress, in adopting the provisions in question, is distinctly marked. The jurist's opinion and the legislative act are, in point of principle, in manifest and perfect harmony.

The motive of introducing this mode is apparent. The business of banking, from its extent, great influence and profitable character, ought not to be relieved from contributing its fair proportion to the expense of the local governments. When United States securities are in any degree elements of a banking capital, either under the national or State system, the public creditor derives from the public securities issued to him a new and independent profit not contemplated in his loan to the government. A uniform system of taxation in respect to the business of banking under either the national or State systems presented the true means of attaining a just end, and Congress adopted it.

The notion of a deduction from the value of the shares by reason of investments by the bank in United States securities, was not absent from the legislative mind. It was met in Congress and repelled as unsound.

The present provision in section 41 was reported by the Senate Finance Committee in the place of a provision which contained this clause: "*Provided*, That no State tax shall be imposed on any part of the capital stock of such associations invested in the bonds of the United States deposited as security for its circulation." On the amendment reported by the Committee there was a long discussion on the point whether any portion of the shares should be exempted from State taxation by reason of any United States bonds the bank might hold, and on every vote the expression was very strong against the exemption. (*Congressional Globe, part* 2, p. 1871.)

Senators FESSENDEN and COLLAMER both forcibly argued that the shares should be made taxable without reference to the amount of United States bonds the bank held, and more than two-thirds of the Senate agreed with them Mr. FESSENDEN said (*Cong. Globe*, p. 1,872): "We do not break faith at all, because when we proposed to exempt certain bonds issued by the government and purchased by individuals from State taxation, it was simply as property so invested, not as property used for the purpose of banking giving to it another and distinctive character. We say simply, in reference to this matter, if you choose, instead of specie or any other

property which you have which is to be deposited as security for your bills, you may deposit and we will accept bonds of the United States. That is a privilege we give them. Then, we say, when there is an organization of a bank in this way and the persons who put their capital into it take it out of their other business or their other means, subject as that is to State taxation, and put it in this particular bank, that that capital shall remain subject to State taxation precisely in the same way that other property is, or that it was before they invested it in that particular mode.

"This is all we say with reference to it. The question as to taxing these banks out of existence, which has been talked about, has not the slightest application in the world, because we limit the power of State taxation. They must tax this property thus invested precisely as they tax other personal property, and to no greater extent. The power of taxation is limited in the same way."

Judge COLLAMER said (p. 1,890): "I insist that a tax upon the shareholders in a bank is no tax upon the stock of that bank. * * * But to say that a tax upon the shares of a bank is a tax upon the bonds that constitute the capital of that bank is utterly fallacious. * * * The truth is that when we gave out these

bonds to the people all the assurance given to them was that they should not be taxed by the States. A man may have them and hold them, and I grant that they are property in one respect. For instance, they are the means of making a pledge; they can be used as collateral security for borrowing money. They are valuable in other ways besides the interest received from the government. But when you undertake to make a law by which you transfer them into banking capital, and enable the man who holds them, not to borrow money upon them, but to lend money upon them, that is entirely a different affair; that is entirely a privilege, and one to which, when granted, the government may annex such conditions as it thinks proper."

At page 2,199 Judge COLLAMER further says: "But when we undertake to make them (United States bonds) into bank capital, and authorize the associations to issue currency upon the strength of them, and bank upon them, that is entirely a new privilege. That is the privilege of loaning money on them, not borrowing money on them; and for that new privilege of using these bonds as a banking capital the government has a right, of course, to annex to the grant of that new privilege such conditions as it may think proper, and it has annexed a great many conditions in this bill."

A decided majority of the judges of this court, by Mr. Justice NELSON, in *Van Allen* vs. *The Assessors*, 3 *Wallace*, 586, repudiated the claim to a deduction from the valuation of the shares on account of investments by the bank in United States securities. This is done with a vigor and point that leave no room for argument or illustration.

The words of the act are intensely plain. The legislative department has repelled this claim; and a large majority of the judicial department has repudiated it. It cannot be sustained.

EIGHTH POINT.—The two restrictive clauses of the National Bank Law contained in the first and second provisoes of the 41st section are devoted to the purpose of preventing inequalities in State taxation to the prejudice of shareholders in the national banks. They cover that entire subject. No more is required than full and perfect conformity to these clauses in good faith according to their manifest import. And it will be found that the State authorities have fully complied with all their requirements.

I. An apprehension of rivalry between the national and State banking systems dictated

the restriction in the *second* proviso. Its limited field of action and the simplicity of its object gave to this restrictive clause a precision, intensity, and force that left nothing to be desired. It is not probable that experience can ever develop any lurking, unforeseen mischief to be provided for by amendment.

(1.) It provided that the tax upon *shares* in the national banks

> "Shall not exceed the rate imposed upon the *shares* in any of the banks organized under authority of the State where such [national banking] association is located."

These words prohibited a State tax upon *shares* in the national banks unless there was also a State tax upon *shares* in the State banks.

As a prerequisite to the privilege of taxing the annual profits of shareholders in the national banks, which Congress sanctioned by this act, it was made imperative upon the State to tax the shareholders in its own banks on their *shares*. No method of directly taxing the State banks would have met the requirements of this clause. Had it been apparent in *Van Allen vs. The Assessors*, 3d *Wallace*, 573, that, by a direct tax upon

the New York State banks, the profits of their business and the dividends of their shareholders were burdened and encroached upon by taxes to an extent exceeding by tenfold the tax on *shares* in the national banks, the judgment of the State Court must still have been reversed Until there was imposed by the State a tax upon the shares of its own banks in the hands of the shareholders, there was no permission accorded to the State by Congress to tax shares or shareholders in the national banks.

(2.) The efficacy of this requisition is quite apparent. The judgment in *Van Allen's* case illustrates it. If the State tax, in respect to State banks, might be laid upon the bank's capital, a deduction would necessarily be made for United States securities held by the bank; and no such deduction being required or proper when taxing a shareholder for the value of his shares, there might result indirectly to the shareholders in the State banks a partial exemption from taxes not accorded to shareholders in the national banks. Than this, nothing could have been less in accordance

with the *animus* of the National Banking Law.

II. The restrictive clause in the first proviso was designed for the same general purpose. It sought to prevent inequalities in State taxation to the prejudice of shareholders in the national banks. But, as it had a much wider field to deal with than the second proviso, it was differently framed. In the contemplation of those who penned this first proviso, the shareholders in the national banks were, of course, placed in contrast with all the various descriptions of persons and property that might be subject to the State's taxing power. It was impossible to construct any set of provisions, much less any single sentence, sufficiently compendious to guard effectually and in detail against all possible attempts at favoritism in State taxation. There were known to be numerous cases of special exemption from taxes under State laws which ought not to be interfered with. Many, if not all of them, were no prejudice to the tax-paying class. Under these circumstances the most obviously just and beneficial way of protecting shareholders in the national banks from State favoritism toward others was adopted by means of the first proviso. It enacted that the taxes im-

posed on the shares in the national banks should NOT be

"at a greater *rate* than is assessed upon other moneyed capital in the hands of *individual citizens* of such State."

(1.) This prohibition selected, as the test of fairness in State taxation toward shareholders in national banks, the rate imposed on the most favored class of taxpayers within the State —those who, having the control of the State government, would necessarily enjoy the highest measure of favor in its legislation.

(2.) The word "rate" refers simply to the proportion in which the tax might be imposed on the assessed value of the thing taxed. Neither in this first proviso nor in the second is the word *rate* employed as an equivalent for *tax*. Looked at singly and by itself, it has the same office in both places.

(3.) Exemptions which might be enjoyed by particular individuals do not come within the intent or effect of this first proviso. The *rate* of taxation has no application to things wholly

exempt from taxes. The *rate* applies only to the thing which is taxed.

(4.) Where, in the second proviso, Congress sought to guard against a prejudice to shareholders in the national banks arising from an exemption then enjoyed by the State banks, the word "*rate*" was not relied upon as adequate to accomplish the object. Express provision was made for a like *mode of taxing* in respect both to the national and State banks. In such case the *shares* were to be taxed.

NINTH POINT.—Keeping in view the true import of the word "*rate*" as employed in this first proviso, it cannot be maintained that the words "other moneyed capital in the hands of individual citizens" have any reference to the securities of the United States held by such "individual citizens."

I. "Individual citizens" having *in their hands* securities of the United States cannot be taxed *thereon* at any *rate* whatever. How, then, could this sort of moneyed capital be referred to as, in any degree, a test of the rate by which other things might be taxed?

II. In their unchanged original condition as lenders to the general government, there could be no shadow of ground for taxing by State authority the individual holders of the United States securities.

III. When it is provided by law that A. may be taxed on a certain description of moneyed capital, but not at a higher rate than is imposed on "*other* moneyed capital," the latter words must refer to other *taxable* capital. How can a thing not taxable be referred to as a standard for the measure of taxation upon a thing which is specially and expressly authorized to be taxed? Every rational principle of construction and all the laws of language forbid such an idea.

TENTH POINT.—By the laws of New York the capital of insurance companies is taxed, directly, in the hands of the companies; of course, the amount of United States securities held as an investment by any such company is deducted from the assessed value of its capital, and no tax whatever is imposed upon its shares in the hands of the shareholders. (*Revised Statutes of New York of* 1830, *vol.* 1, *p.* 944, *sec.* 1; *and p.* 907, *sec.* 14, *fifth edition.*) From this state of facts it is possible that, indirectly, some shareholders in insurance companies may enjoy a

partial exemption from State taxes not accorded to shareholders in the national banks. The plaintiffs in error contend that this produces a precise parallel to the contrast between the condition of shareholders in the State banks and that of shareholders in the national banks created by the tenth section of the State Enabling Act of 1865, and which led to the reversal in *Van Allen* vs. *The Assessors in* 3*d Wallace's R.*, 573. If this be perfectly true in fact, it does not result, as a legal consequence, that the judgment now under review is erroneous.

I. *Van Allen's* case arose under the second proviso in the National Bank Law. That proviso expressly referred to such a contrast between the State and national bank *shares* as was created by the State law of 1865, and positively prohibited it.

II. The question made in this case with reference to the contrast between shareholders in the national banks and shareholders in the State insurance companies is determinable by the *first* proviso only; and that proviso does not prohibit such contrast or provide against it or refer to it in any way, either directly or by any reasonable implication.

ELEVENTH POINT.—The attempt of the defendants in error to bring this tax into the precise predicament of the tax directed by the State Enabling Act of 1865, and condemned by this Court in *Van Allen's case*, 3 *Wallace*, 573, cannot prevail if due attention be given to the difference in the structure and import of the two prohibitions in the forty-first section of the National Bank Law.

I. The idea of guarding against a circuity by which shareholders in State institutions might be favored to the prejudice of shareholders in the national banks was present to the legislative mind, and was acted on in the second proviso. This is distinct evidence, written on the face of the act itself, that *such* an unfavorable discrimination would not be reached or prohibited by the first proviso.

II. The whole extent to which such discriminations came within the prohibitory policy of Congress is manifested by the second proviso. If there was an intent to go further and to prohibit them in other cases than in respect to the State banks, it would have been quite easy to include in that proviso, along with *shares* in the State banks, a provision requiring in like manner the taxation of *shares* "in every trading corporation." This

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would have compelled the States to depart wholly from the practice of taxing corporate capital and to introduce in its stead, in every case of corporations organized for individual gain, the practice of taxing the *shares* in the hands of the shareholders.

(1.) So sweeping a change might have been found liable to many inconveniences in practice, and it is presumable that for this reason Congress declined to introduce it.

(2.) There was no probable or presumable conflict of interest between the national banks and State trading corporations engaged in any business other than that of banking. Hence there was little reason to apprehend that, in this indirect way, shareholders in ordinary trading corporations organized under State authority would enjoy even the slightest advantage over shareholders in the national banks.

(3.) There are not many trading corporations which can invest their capital, or any part thereof, in United States securities. Railroad companies,

manufacturing companies and, indeed, the whole class of trading corporations, *except banks and insurance companies*, are obliged to keep all their money actively employed in their business. Trading companies in general are not so constituted that they require to hold large amounts of capital unemployed as a security for the prompt redemption of their obligations in case of disaster. This is a peculiarity of banks and insurance companies.

(4.) As to a great number of trading corporations, it would be very injurious to other classes of taxpayers to exempt their capitals and tax their *shares*. Many of them hold a very large amount of taxable property and are taxed on receipts and otherwise burdened, whilst their *shares*, yielding no dividends, are of very slight value.

III. These considerations might lead to the conclusion that Congress ought to have perceived that it was only necessary to include insurance companies, along with State banks, in the rule of taxing *shares* in the hands of shareholders instead of taxing capital in the

hands of the corporations, as prescribed by the second proviso.

But this Court is not the constitutional judge of that question. Congress alone had authority over it; and the total absence of any conflict in interest between the national banks and the insurance companies was a sufficient reason for abstaining from such an enactment.

IV. The words of the prohibitory clause in this proviso preclude the construction that it was intended to work, as it respects all corporations carrying on trade for the individual benefit of their shareholders, the precise effect wrought in respect to State banks by the second proviso.

(1.) A general policy should not be imputed by mere implication to one clause in a statute when that very policy is the sole object of the next clause in the same statute, and it is there expressly defined and accurately limited in its practical application.

(2.) The very exact definition of the class of taxpayers named in the first proviso, as a test of favoritism, is

exclusive of any such implications as are contended for by the defendants in error. It is:

> "Other moneyed capital in the hands of individual citizens of the State."

Corporations are distinctly excluded. *Individuals* not being *citizens* of the State, or, as we presume that term implies, not being residents of the State, are also excluded. Thus a very special test is enacted.

(3.) The exclusion of corporations and the exclusion of non-residents, in framing the test, show that the *property* taxed or taxable did not enter into the nature or formation of the test itself. For its substantial purposes reference is had to *persons* only. Property is merely referred to by the general words "moneyed capital," and, from the necessity imposed upon forms of expression by the practice of taxing, only in respect of property.

(4.) There is no such idea embraced in the words under consideration as that all property or all moneyed capital in the hands of individuals

must be taxed. Nothing of the kind would have been intended.

Under the laws of the State of New York there are numerous exemptions of the property of individuals from assessment for taxes.

(*a.*) Within a certain limit the property of every minister of the gospel is exempted. (1 *New York Revised Statutes of* 1830, *p.* 906, *sec.* 5, *sub-sec.* 8, *fifth edition.*)

(*b.*) All the various articles which are exempt from levy on execution are also exempt from taxation. (*New York Revised Statutes of* 1830, *vol.* 1, *p.* 906, *sec.* 5, *sub-sec.* 9, *and also vol.* 3, *p.* 645, *sec.* 22, *fifth ed.*)

Again, there are numerous exemptions from assessment for taxes in favor of particular institutions, as churches, hospitals, academies, libraries, &c. These are sometimes held by incorporated bodies, and sometimes the owners are not incorporated. (1 *New York Revised Statutes of* 1830, *p.* 906, *fifth edition.*)

The like or similar exemptions will

be found in the statutes of every State in the Union. Hence, in this first proviso the word *rate* is employed in its primary import; and nothing more is required by it than that the rate, standard, or percentage of taxation upon the shareholders in the national banks shall not be higher than that imposed upon the most favored class of individuals within the State.

(5.) The omission of any reference to corporations in the general test applied by this first proviso was manifestly deliberate, intentional, politic, and just. The States conduct much of their public business through corporations. Of course, all the property of such bodies belongs to the State, and none of it is ever taxed. Charitable and religious institutions, though founded by private individuals, are usually incorporated and to a great extent exempted from taxation. Other taxpayers would derive no advantage from setting aside these exemptions.

V. If sound policy requires that shareholders in

insurance companies or any other trading corporation should be brought into the relation to shareholders in the national banks indicated by the second proviso, the judgment below should not be reversed.

(1.) Congress has not enacted that the modes of State taxation shall be such that no discrimination can be made unfavorable to shareholders in national banks as compared with any other persons or institutions. Indeed, such a sweeping enactment would have been found utterly impracticable. The course adopted was to guard against favoritism by distinct and pointed provisions. If these provisions do not reach every possible case that ought to be provided for, the only admissible remedy is by amendment. That remedy can be applied at any moment; but until it is applied the act must take effect as it stands.

(2.) To the suggestion that shareholders in insurance companies are favored contrary to the intent of Congress, it is a sufficient answer that Congress has not seen fit to prohibit it. *Internal Revenue Act of July* 13, 1866, *page* 131.

In respect to insurance companies or other State corporations than banks, there is nothing in the act of Congress enjoining as a prerequisite to the exercise of State power in the premises that their *shares* should be taxed. The injunction to that effect as to banks in the second proviso distinctly negatives the idea. *Expressio unius exclusio est alterius.*

In a word, the prerequisites to the exercise of State authority in taxing shares in the national banks, as deducible from both provisoes taken together, may be thus defined: The *shares* in the State banks must be taxed; the *rate* of taxation on the shares in the national banks must not be higher than that imposed on the *shares* in the State banks or on the moneyed capital in the hands of *individual citizens.* The whole of these prerequisites have been literally complied with.

If the shareholders in insurance companies and State corporations other than banks derive any incidental advantage from the fact that these institutions are plainly not within the scope of either proviso, it is quite immaterial in the present case. If it be an evil, Congress can remedy

it any time. It cannot be corrected by the Courts.

TWELFTH POINT.—If the views above presented as to the construction of the act of Congress called the National Bank Law were erroneous, still, the assessment of the shares in the State banks would be free from exception. This is the only distinction between the case of the State banks and that of the national banks.

THIRTEENTH POINT.—The judgment is not impeachable for any defect or irregularity in the forms of procedure adopted by "The Commissioners of Taxes and Assessments of the city and county of New York."

I. No inquiry concerning the forms pursued can be entertained in this Court except such as might arise under the acts of Congress. Whether or not the course of proceeding enjoined upon the State officers by the State law has been observed by them is a question exclusively of State cognizance, and finally determinable by State courts. (*Judiciary Acts, Section* 25, 1 *Statutes at Large, p.* 86.)

II. The only matter of form prescribed by Congress in respect to the assessment is, that it shall be "at the place where [the] bank is located, and not elsewhere." 13*th Statutes at Large*, 112, *sec.* 41.

It appears by the record that the assessment was so made.

III. The permission given in the forty-first section, that the shares may be "*included* in the valuation of the personal property" of the holder, cannot be supposed to require, as an indispensable prerequisite to the taxation of such holder for his shares, that he should have other personal property in the same place or assessment district in which the bank is located.

FOURTEENTH POINT.—If such an inquiry can be entertained here, an examination of the record will show that the proceedings had were all regular and in due conformity with the laws of the State of New York.

I. The system organized by the "Act in relation to taxes and assessments in the city

of New York, and to amend the several acts in relation thereto," passed April 14, 1859 (*Laws of* 1859, *chap.* 302, *p.* 678), contemplates, among other things, the action of two distinct classes of persons; that is to say, a *Deputy Tax Commissioner* for each of the several city districts, and a *Board of Commissioners.* The *Deputy* performs a duty preliminary to, but altogether distinct from, the duty charged upon the *Board.* The latter exercises essentially an appellate or revisory power in respect to the action of the Deputies.

Each *Deputy* is required to make a preliminary assessment of all taxable property in his district. He is required to "*commence to assess * * * on the first Monday of September in each and every year.*" (*Sec.* 7.) It seems quite obvious that his duty is to be completed and his returns made to the *Board* on or before the second Monday of January following. (*Sec.* 8.) But it is clear beyond a doubt that his action must terminate before the second day of April next after the commencement of his duties. (*Sections* 8, 9, 10, 11.)

II. The *Board* of Tax Commissioners is required to "keep in their office, * * open to public inspection, * from the second Monday of January until the first day of May in each

and every year, * books * to be called '*the annual record of the assessed valuation of real and personal estate*,' in which shall be entered in detail the assessed valuations of such property within the city and county of New York." (*Sections* 8–10.)

The act evidently contemplates that these *books* shall, in the first instance, be made up conformably to the assessed valuations so returned to the Board by the Deputies from their respective districts.

The Board may *increase* any valuation until the second day of April, or diminish any valuation until the first day of May. (*Section* 11.)

But on the latter day (*i. e.* May 1) the books are required to "be closed, to enable the [Board of] Commissioners to prepare assessment rolls * for delivery to the Supervisors." (*Section* 8.) And such delivery is required on the first Monday of July. (*Section* 12.)

I.—When, on the 23d of April, 1866 (*Laws of New York for* 1866, *vol.* 2, *p.* 1647), the Legislature changed the existing practice and enacted that the stockholders of banks should be taxed on their proprietary interests in the shares, in lieu of taxing the

banks themselves on their capital, the period which the New York city Tax Law of 1859, then in force, had assigned for action by the *Deputy Tax Commissioners* had elapsed. The whole subject had already passed from the Deputies to the Board of Revision; and even that Board itself had no longer the power to *increase* any valuation. The second of April was already passed. (*Laws of* 1859, *p.* 682, *section* 11.)

IV.—The act of April 20, 1866 (*Laws of* 1866, *vol.* 2, *p.* 1493), was made to meet and provide for this precise state of things. It did so provide effectually.

(1.) It gave the *Board* "full power and authority to *make* * * the assessments." This was an entirely new function. Under the pre-existing law it was merely a Board of Revision; but this act, *quoad*, "the current year" conferred on it an *original* authority.

(2.) It is true that the provisions for public notice and hearing of the parties in interest and for a reduction of the tax in cases where justice might require it, so industriously provided in the act of 1859, do not in terms apply to this authority to assess granted to the Board itself by chapter 698 of 1866.

The necessity of such a statutory code of procedure is not apparent. All bodies exercising a special authority to act upon or which may affect the private rights of individuals, are bound, by the common law, to afford those who may be interested an opportunity of being heard. And if this were not so, a tax act which omitted to provide the citizen with such safeguards would not be *void*.

(3.) Though it may, at first blush, seem otherwise it is obvious that the law of 1859, gave the Board of Tax Commissioners until the first Monday of July to complete their assessment-rolls (*see* 12, 13). But, of abundant caution, and in order to afford time for reasonable notice to the parties in interest and opportunity for a full hearing of their objections in analogy to the prior and general practice of the Tax Office, chap. 698 of 1866 *expressly* authorized the Board to act upon the assessment-rolls during the whole months of May and June. The return shows that the relators had the full benefit of this benign construction. They were notified; they were heard.

(4.) The intent is apparent that the tax should be

assessed for the current fiscal year. The last-named act is so expressed. When the act taxing the stockholders was passed the assessment for the current fiscal year had not yet been made; and, consequently, the rule that statutes are to be construed prospectively does not affect the case.

V.—The necessity for this short special tax act of 1866 relative to the city of New York arose out of the fact that there is a difference between the general law of the State regulating the assessment of taxes and the law of 1859 regulating assessments in the city of New York, before referred to.

(1.) The State act, under which the assessment on bank shares mentioned in the record was authorized, was passed April 23, 1866. (*N. Y. Laws* of 1866, vol. 2, p. 1,647.) At this time, as has already been shown, the date prescribed for many branches of the assessment practice in the city of New York had elapsed. But

(2.) The time had not yet arrived for complet-

ing any one step in process of assessment under the general law of the State.

1. *Revised Statutes of New York, 6th Ed., p. 909, secs.* 8, 17, 18, 26, shows that the process commences May 1 in the current fiscal year, instead of commencing in the preceeding year, as required by the city tax act of 1859.

The judgment should be affirmed.

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WALDO HUTCHINS,
AMASA J. PARKER,
CHARLES O'CONOR,
Counsel for the Defendants in Error.

Supreme Court of the U. S.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK, ON THE RELATION OF PETER M. BRYSON, PRESIDENT OF THE PHENIX NATIONAL BANK, ON BEHALF OF HIMSELF AND ALL OTHERS, STOCKHOLDERS OF SAID BANK,

Plaintiffs in Error,

against

THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK,

Defendants in Error.

Points on the part of the Plaintiffs in Error.

EDGAR S. VAN WINKLE,
Of Counsel.
48 WALL ST., NEW YORK

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1866.

WM. C. BRYANT & Co., Printers, 41 Nassau, cor. Liberty Street, N. Y.

Supreme Court

OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of PETER M. BRYSON, President of the Phenix National Bank, on behalf of himself and all others, stockholders of said Bank,
Plaintiffs in Error,
against
THE COMMISSIONERS OF TAXES AND ASSESSMENTS, of the City and County of New York,
Defendants in Error.

No. 304

Points on the part of the Plaintiffs in Error.

This case comes up on a writ of error to the Court of Appeals of the State of New York, issued on a judgment of that Court affirming one of the Supreme Court of that State, which declared the assessment by the State of New York, under its Act of April 13th, 1866, of shares in National Banks, irrespective of the amount of their capital invested in bonds and other securities of the United States, and under the circumstances stated in the printed case, constitutional, legal and valid.

I.—The only power of the States to tax shares in National Banks must be found in the only Act of Congress on the subject, which is that of June 3d, 1864, (13 Statutes at large, 99, 111,) and the exercise of the power must be strictly in accordance with that Act.

Prior to the passage of that Act, the individual States could not tax the *Capital* of National Banks.

McCulloch *v.* Maryland,, 4 Wheat, p. 416.
Osborn *v.* Bank of United States, 9 Wheat, p. 738.

It was also maintained, and there was no decision of this Court, directly to the contrary, although some opinions to that effect were declared as dicta, that the States could not tax the *shares* of National Banks.

But whatever doubts were entertained, were ended by the express action of Congress in declaring in what manner the shares of National Banks might be taxed.

The concurrent power of the States so to do, if it existed, was ousted by the action of Congress in the matter, or rather, was thereby regulated and limited.

II.—Prior to the passage of said Act of June 3, 1864, the public debt of the United States, whether held by a Corporation or an individual, could not be taxed by any State or municipal authority.

McCulloch *v.* The State of Maryland, 4 Wheat., 316.
Osborn *v.* The U. S. Bank, 9 Wheat., 728.
Weston *v.* The City of Charleston, 2 Peters, 449.

Bank of Commerce Case, 2 Black., 620.
Bank Tax Case, 2 Wallace, 206.
Act of Congress of 25th of Feb'y, 1862.

And it was also maintained, (and never judicially decided otherwise, in this Court at least,) that shares of the capital of a bank invested in United States' Securities, could not be taxed.

The only statutory or definite authority to tax such shares is to be found in the Act of Congress above cited, the only judicial construction of which is Van Allen *vs.* The Assessors, 3 Wallace, 573.

If such authority is not relied on, or deemed necessary to be invoked, to sustain the taxation of such shares now in controversy, then the question is believed to be an open one, and may fairly be argued before this Court.

If such authority is relied on, and is the exclusive authority, then the question whether the particular taxation of shares now in dispute, is in accordance with such authority, and the limitations imposed by it, remains to be judicially determined in this Court.

The decision in Van Allen's Case, is by some supposed not to have decided the question, whether shares are distinct from capital, as the subject of Taxation. Even Chief Justice Davies (pamphlet, p. 6,)) speaks of it as an opinion rather than a decision ; but deeming that expression of opinion by the majority, to be a pretty strong one, I shall not argue against it at length, but leave the point with a few remarks, to the matured judgment of the Court.

III.—The authority for the State of New York to Tax National Bank Shares, can only be found in the Act of Congress of June 3, 1864 ; and the act of the Legislature of the State of New York, of April 23d, 1866. (Laws of 1866, Ch. 761 ; Vol. 2, pp. 16, 47.)

The preceding propositions render necessary a recurrence to the Act of Congress, of June 3, 1864, in order to determine the law of this Case.

That act provides in its 41st Section for a Taxation of the National Banks by the United States. And then declares:

1st. "Provided that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any persrn or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State.

2d. *Provided further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under autho rity of the State where such association is located.

3d. *Provided, also*, That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

IV.—If this Court does not consider the question of right to tax shares in National Banks whose capital is invested in United States stocks, to be judicially settled, then the following considerations are presented on that point.

First.—A reference is made to the reasoning in the dissenting opinions of Justice Comstock, in the case of the People *vs.* The Commissioners of Taxes and Assessments, 23 N. Y. Reports, p. 192–220; and of Chief Justice Chase,

in the case of Van Allan against the Assessors, in 3 Wallace, p. 588; and that reasoning is adopted here.

A reference is also made to the case of Churchill *vs.* the City of Utica, argued in this court in 1866. and the opinions of Chief Justice Chase and of Justice Nelson, in that case.

Secondly.—The following brief views are presented:

Shares of stock in a bank are identical with the capital.

The aggregate of shares represents the aggregate of capital.

Any profit on the capital increases the value of the shares. A loss of the capital renders the shares worthless.

One person cannot own the capital and another own the shares.

Taxes in New York must be laid on lands or personal estate. 1 R. S., 387, § 1.

A tax on shares is not a tax on real estate. It must, therefore, if valid, be a tax on personal estate.

The capital of a bank, less the amount invested in real estate, is personal estate.

If the capital, then, is personal estate, is a proprietary right or share in that capital also personal estate, for the purposes of taxation? Are there two personal estates in the same hundred dollars?

A tax on the shares is a tax on the capital, for the aggregate of the shareholders own the aggregate of the capital, and they pay a tax on that aggregate by paying on all their individual shares.

Therefore, if any power taxes the shares, it taxes the capital.

The proposition is, that a State cannot in any way tax the capital, nor *a posteriori*, the shares of a National Bank.

These banks are all organized under the Act of Congress entitled, "*An Act to provide a National Currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof*," passed June 3, 1864.

The Supreme Court of the United States held originally, and still hold, that banks created by Congress, in pursu-

ance of its implied and necessary power, are *instruments* for carrying into effect a sovereign power, and are free from the control or taxation of any State.

They are free under the Constitution without any declaratory act of Congress.

The Constitution *ex proprio vigore* exempts them.

This from the necessity of the case. The Constitution and the laws made in pursuance thereof would cease to be supreme if any State legislation could thwart or obstruct them.

Again; All bonds and securities of the United States issued on its credit are exempt from taxation by any State *under* the Constitution. Why? Because issued in pursuance of a sovereign power, and as a necessity to carry on the government, it would be suicidal to permit any other power to control them or interfere with them in any manner.

It needs no argument to show that to permit a taxation of the shares of a National Bank, would be, in effect, obstructing the operations of one of the "instruments" of the government. The shares become worth so much less, and if States can tax them *ad libitum* they are no better as instruments than any other bank stock.

It is well settled that the banks cannot be directly taxed, and that United States bonds and securities cannot be taxed by State authority, and yet it is contended that although you cannt tax the capital, you may tax the shares of that capital. You cannot tax the whole, but you may tax all the parts.

Why not contend, then, that although you cannot tax the U. S. bond, you may tax the proprietary right in it, and that if two or more jointly own an United States bond, though you cannot tax the entirety, you can tax all the separate interests?

No one can pretend that a share in a National Bank is worth as much if subject to State taxation, as if exempt from it.

The Act under which the National Banks are organized, renders these banks national instruments for the exercise of national sovereignty, and also renders necessary the invest-

ment of a large portion of their means in United States securities.

1. It is an Act "to provide a national currency." Every branch organized under it must be a bank of circulation, without this it cannot be created.

2. It is "to provide a national currency, secured by a pledge of U. S. bonds."

To a certain extent, every one of these banks must purchase U. S. securities.

3. The Act is also entitled "to provide for the circulation and redemption thereof."

That circulation and redemption is based upon the security of U. S. bonds.

It is considered necessary and advantageous to the nation, to have these banks furnish the currency. The establishment of these banks appreciates the national bonds, and creates a demand for them. If ownership in these bonds is subject to State taxation, their value is so far diminished, and they are so much less objects to be sought for.

Taxation of the shares is, in fact, taxation of the banks, and, also taxation of the U. S. securities.

There can be no doubt then, that, but for the Act of Congress referred to, no State or municipal authority could tax shares of a National Bank whose whole capital was invested in U. S. bonds.

V.—But whether the proposition in the last point is open for argument or not, the State law of April 13th, 1866, and the action of the State thereunder, are not in accordance with the limitations contained in the 41st section of the Act of Congress of June 3, 1864, for the tax imposed by the State of New York on shares in National Banks does exceed the rate

imposed upon the shares of the banks organized under the authority of the State, and is therefore invalid.

With, or without, the last mentioned act, it seems to be conceded that no State could tax the *capital* of a bank invested in United States securities, and the passage of the act would seem to indicate that, before its passage, no State could tax the *shares* of such capital.

This act confers no authority on the States to tax the capital or shares of State Banks whose capital is invested in United States securities, and, therefore, State taxation of such capital and shares would seem to be invalid.

In the case in 3 Wallace, at p. 583, Justice Nelson sustains the tax on National Bank shares, (admitting, for the sake of the argument, that such tax is equivalent to a tax on the bonds or capital of the bank,) on the ground that Congress has granted to these banks new uses and privileges in the use of bonds conferred on the banks, and declares that "The tax is the condition for the new rights and privileges conferred upon these associations."

This, of course, does not apply to State Banks. The States, therefore, can find no power in the Act of Congress to tax either the capital or shares of State Banks; how, then, can the illegal tax the State of New York has imposed on State Bank shares, and which it cannot collect, be considered an equivalent for, or as justifying the tax laid on shares in National Banks?

VI.—The tax assessed by the New York statute is also invalid, because it is at a greater rate than is by the laws of New York, assessed on other moneyed capital in the hands of individual citizens of such State.

This is shown by the return of the Commisioners, which is as follows: (See Case, fol. .)

"That in estimating and assessing the value of the said shares, "that is, shares in National Banks," no allowance or deduction was made for or on account of any investment of any portion of the capital stock of the said bank in the stocks, bonds and securities of the United States.

"That insurance companies created under the laws of the State of New York, and doing business in said city of New York, were respectively assessed for the taxes of the year 1866, upon the balance or residue only of their capital and surplus profits liable to taxation, after making such deductions therefrom as are required by the laws of said State, and after deducting also therefrom the amount of bonds and other securities of the United States, declared by the Congress of the United States to be exempt from taxation by or under State or municipal authority.

"That for the purpose of taxation for the said year, for and in respect to their personal estate other than the the shares of any bank or banking association held by them, individuals were respectively assessed only to the amount of their said personal estate, after deducting such part thereof as was invested in such bonds and other securities of the United States, as last before specified."

It also appears, that by law, moneyed capital in the hands of individuals, consisting of stocks or bonds of the United States, is not taxed.

1 Rev. St., 388, § 4, sub. 1.

To meet this objection various arguments and statements are resoted to.

1. That moneyed capital invested in insurance companies does not come within the meaning of the proviso.

To which we reply, that all moneyed capital, whether invested in corporations or business, is in the hands of individual citizens. "In the hands of" is equivalent to "belonging to." We also rely on the spirit and intent of the law, which is to prevent discrimination against moneyed capital of individual citizens invested in Government bonds and moneyed capital otherwise invested.

2. Another argument is, that the word "rate" is to be

used in a limited and exclusive sense, and that if the per centage of taxation is the same, that is, one, or two, or three per cent. upon all property taxed, the law is com. complied with.

The answer to this is, that a rate of taxation to be equal must be on all property alike. If on two men, each owning say ten thousand dollars of moneyed capital, a tax of two per cent. is imposed, and then from the list or valuation of one is deducted, all the moneyed capital he has invested in insurance companies, while the other is rated for all his invested in National Banks, the rate cannot be said to be the same.

But there remains the great fact, that by the laws of New York moneyed capital invested by individuals in United States securities, is not taxed at the same rate as moneyed capital invested in national banks.

The tax in question is therefore void.

VII.—The judgment of the Court of Appeals should be reversed.

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